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Supreme Court, U.S.

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6020

ROBERT DOUGLAS SMITH

Petitioner,

vs.

THE STATE OF ARIZONA

Respondent.

REPLY TO STATE'S RESPONSE
TO PETITION FOR WRIT
OF CERTIORARI

LAWRENCE H. FLEISCHMAN
Assistant Public Defender
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Tucson, Arizona 85701

Attorney for Petitioner

1 Petitioner disputes the position of the State in its
2 response on the following points:

3 1) However the State wishes to mask the point, the fact
4 is that Petitioner's jury was informed that there was undis-
5 closed evidence they were not going to be able to hear in this
6 case, and that such evidence was precluded from them for "legal
7 reasons." The attempt to equate this situation with the
8 sustaining of an evidentiary objection is simply unsupportable.
9 State v. Moore, 108 Ariz. 215, 495 P.2d 445 (1972) was cited
10 to this Court as one of many examples of cases in which the
11 Arizona courts determined it to be reversible error when
12 irrelevant information such as the existence of prior convic-
13 tions is placed before a jury.

14 What could be more irrelevant and yet more prejudicial than
15 the trial judge's statement that certain undesignated evidence
16 was kept from the jury in this case due to "legal reasons?"
17 Clearly, such a statement could not help but make the jury
18 believe that the defendant was successful in suppressing
19 evidence which they otherwise would have been able to hear.
20 Consequently, this statement, when coupled with the use of
21 dual juries, created constitutional error.

22 2) The State claims that it is willing, "for the sake of
23 argument," to assume that petitioner received the death penalty
24 solely upon Kathy Foreman's testimony. (Response to petition,
25 n. 13). There is no argument about this; as Justice Feltman
26 noted in his dissent, there is no question but that Foreman's
27 testimony formed the basis for imposition of the death penalty
28 against petitioner in this case. See Smith, supra, at slip
29 op. pp. 18-19.

30 The State is asking this Court to disregard reality when
31 it boldly claims that "there is nothing to indicate that

1 [Foreman] did not abide by the agreement" to testify truth-
2 fully. (Response, n. 13). In reality, of course, there was
3 nothing in the way of objective facts which could have proved
4 Foreman to be a liar, and Foreman knew it. Indeed, as the
5 Arizona Supreme Court recognized in the Lambright opinion,
6 Foreman's testimony was neither unique or essential, but it
7 clearly provided her with a motive to lie. Lambright, supra,
8 at slip op. pp. 30-31, see also Smith, supra, at slip op.
9 pp. 18-19 (dissent by Feldman, J.).

10 3) Nor can the State escape the fact that the Arizona
11 Supreme Court utilized evidence supplied by Foreman to place
12 Petitioner outside the purview of Enmund v. Florida, ___ U.S.
13 ___, 102 S.Ct 3368, 73 L.Ed.2d 1140 (1982) and rejected pre-
14 cisely the same evidence when it was asserted against Lambright.
15 (See petition, p. 14; Response, p. 14). Obviously, the Court
16 relied on some of Foreman's testimony against both defendants,
17 but the fact is that the precise testimony used by the Court
18 to establish that Petitioner intended the victim's death was
19 rejected by the Court as being "uncorroborated" in assessing
20 Lambright's particular state of mind. The mere fact that
21 there was ample other evidence against Lambright to establish
22 his depraved state of mind does not alter the Court's rejection
23 of the same evidence which placed Petitioner squarely within
24 the death penalty.

25 CONCLUSION

26 Petitioner submits that both issues raised are ripe for
27 review. This case centers squarely on the propriety of using
28 dual juries when those juries are told that there is certain un-
29 designated evidence being kept from them for "legal reasons,"
30 and when both defendants receive the death penalty after only
31 one week of trial. Moreover, the case presents an important

1 question arising from Enmund concerning whether or not the 8th &
2 Eighth and Fourteenth Amendments can countenance imposition of the
3 death penalty when the factual basis for the sentence comes
4 from the testimony of an equally-culpable witness whose state-
5 ments cannot be proven by extrinsic evidence and who clearly
6 has an excellent reason to lie.

7 For these reasons, Petitioner respectfully requests that
8 this Court grant the petition for certiorari.

9 RESPECTFULLY SUBMITTED this 3rd day of February, 1984.

10 Law Offices
11 PIMA COUNTY PUBLIC DEFENDER

12 BY:

13 
14 LAWRENCE H. FLEISCHMAN
Attorney for Petitioner

15 COPY of the foregoing sent
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